72-479

FILE COPY

FILED
SEP 21 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-479

Donald L. Garren and James A. Eddinger,

Petitioners

v.

City of Winston-Salem, North Carolina,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

Norman B. Smith

316 Southeastern Bldg.
Greensboro, N. C. 27401
Telephone: 919-275-8603

Counsel for Petitioners

INDEX

	Page
Table of Citations	iii
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Argument	13
A board of aldermen elected only by and from residents of the city may not, consistent with the Fourteenth Amendment, act as the highest zoning legislative body for an area extending one mile beyond the city limits from which the residents are not eligible to vote for or be elected to the board of aldermen, by rezoning property within the one-mile extraterritorial limit for the purpose of permitting a garbage dump to be constructed there.	13
1. Denial of right of franchise to persons in the extraterritorial zoning area is a denial of equal protection of the laws.	14
2. Injunctive relief to bar the city from constructing the garbage dump, until and unless the rezoning is accomplished by a body from whose selection petitioners have not been arbitrarily excluded, is the appropriate remedy.	20
Conclusion	23
Appendix	24
Opinion of United States Court of Appeals for the Fourth Circuit of July 18, 1972	24

Opinion of United States Court of Appeals for the Fourth Circuit of March 2, 1971 33
Memorandum Opinion and Order of the United States District Court for the Middle District of North Carolina 39
North Carolina General Statutes 160-181.2 45
North Carolina Laws 1947, Ch. 677 48
North Carolina Laws 1953, Ch. 777 50
North Carolina Laws 1949, Ch. 851 52
Charter of the City of Winston-Salem, North Carolina, Article 2 53
Code of Ordinances of the City of Winston-Salem, North Carolina, Chapter 29 56
Ordinance of the City of Winston-Salem, North Carolina, Enacted September 16, 1969 58

TABLE OF CITATIONS

CASES:

Avery v. Midland County, 390 U.S. 474 (1968) 15, 19
Baker v. Carr, 369 U.S. 186 (1962) 15
Carrington v. Rash, 380 U.S. 89 (1965) 17
Cipriano v. City of Houma, 395 U.S. 701 (1969) 21
Clinard v. Winston-Salem 217 N.C. 119, 6 S.E.2d 867 (1940) 22
Evans v. Cornman, 398 U.S. 419 (1970) 17-18
Fortson v. Morris, 385 U.S. 231 (1966) 22
Hunter v. City of Pittsburg, 207 U.S. 161 (1907) 19
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) 16-17
Lynch v. Household Finance Corporation, 405 U.S. ___, 31 L.ed.2d 424, 92 S.Ct. 1113 (1972) 6
Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907) 19
Phoenix v. Kolodziejski, 399 U.S. 204 (1970) 21
Schloss v. Jamison, 258 N.C. 271, 128 S.E.2d 590 (1962) 22
Smeltzer v. Messer, 311 Ky. 692, 225 S.W.2d 96 (1949) 19

POOR COPY

CONSTITUTIONAL PROVISIONS:
Constitution of the United States, Amendment XIV 2-3, 13

STATUTES:
28 U.S.C.A. 1343 (3) 5
28 U.S.C.A. 2201 5
42 U.S.C.A. 1983 3, 5, 6
North Carolina General Statutes 160-181.2 4, 14
North Carolina Laws 1947, Ch. 677 4, 14
North Carolina Laws 1949, Ch. 851 4
North Carolina Laws 1953, Ch. 777 4, 14
Charter of the City of Winston-Salem, North Carolina, Article 2 4
Code of Ordinances of the City of Winston-Salem, North Carolina, Chapter 29 4, 15

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

Donald L. Garren and James A. Eddinger,

Petitioners,

v.

City of Winston-Salem, North Carolina,

Respondent.

****

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

The petitioners, Donald L. Garren and James A. Eddinger, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on July 18, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit which is sought to be reviewed by this petition is not yet reported. The opinion of the United States District Court for the Middle District of North Carolina in this case is not reported. The prior

POOR COPY

decision of the United States Court of Appeals for the Fourth Circuit in this case is reported at 439 F.2d 140. Copies of these opinions are appended to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was made and entered on July 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

QUESTION PRESENTED

1. Whether a board of aldermen elected only by and from the residents of a city may, consistent with the Fourteenth Amendment, act as the highest zoning legislative body for an area extending one mile beyond the city limits from which the residents are not eligible to vote for or be elected to the board of aldermen, by rezoning property within the one-mile extraterritorial limits for the purpose of permitting a garbage dump to be constructed there.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States,

and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

42 U.S.C.A. 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

General Statutes of North Carolina:

N.C.G.S. 160-181.2

[Set out in Appendix]

North Carolina Public Local Acts:

North Carolina Laws 1947, Ch. 677.

[Set out in Appendix]

North Carolina Laws 1949, Ch. 851.

[Set out in Appendix]

North Carolina Laws 1953, Ch. 777.

[Set out in Appendix]

Charter of the City of Winston-Salem, North Carolina:

[Set out in Appendix]

Code of Ordinances of the City of Winston-Salem, North Carolina:

[Set out in Appendix]

STATEMENT OF THE CASE

This proceeding arises in the United States District Court for the Middle District of North Carolina. Petitioners commenced a civil class action, seeking declaratory and injunctive relief against the City of Winston-Salem. The gist of

the plaintiffs' complaint is that they and the members of their class are residents of a one-mile extraterritorial zoning radius extending beyond the city limits of the City of Winston-Salem, that the Winston-Salem Board of Aldermen has the exclusive and final zoning legislative authority to zone and rezone the area in which they live, but plaintiffs and the members of their class are not permitted to vote for or be elected to the Board of Aldermen. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C.A. 1343 (3), 28 U.S.C.A. 2201, and 42 U.S.C.A. 1983.

The United States District Court for the Middle District of North Carolina, Winston-Salem Division, the Honorable Eugene A. Gordon presiding, held a single hearing at which evidence was taken, and considered together plaintiffs' prayers for preliminary and permanent injunctive relief and declaratory judgment. The Court in its order entered February 20, 1970, dismissed the action with prejudice, upon the alternative grounds that there was no jurisdiction under the civil rights laws because the City of Winston-Salem was not a "person" within the meaning of that term as employed in 42 U.S.C.A. 1983, and that plaintiffs were not entitled to relief on the merits because the recent reapportionment cases did not affect the validity of a long line of annexation cases giving the states through their municipal subdivisions virtually unlimited rights to control municipal boundaries.

POOR COPY

This action was appealed to the United States Court of Appeals for the Fourth Circuit, which rendered its opinion on March 2, 1971, affirming the judgment of the District Court. The Court of Appeals held that the City of Winston-Salem is a "person" within the meaning of that term as used in 42 U.S.C.A. 1983 in an action seeking equitable relief for alleged deprivation of a civil right; but that plaintiffs presented their suffrage right only in the context of the alleged impairment of a property right, and that 42 U.S.C.A. 1983 does not extend to protect property rights, but is concerned only with personal liberties.

The decision of the United States Court of Appeals for the Fourth Circuit was reversed by this court on April 17, 1972. 405 U.S. ___, 31 L.ed.2d 787, 92 S.Ct. ___ (1972), for further consideration in light of Lynch v. Household Finance Corporation, 405 U.S. ___, 31 L.ed.2d 424, 92 S.Ct. 1113 (1972), where it was decided that property rights, as well as distinctly personal liberties, are within the civil rights protected by 42 U.S.C.A. 1983.

On remand the United States Court of Appeals for the Fourth Circuit again affirmed the District Court judgment by an opinion entered on July 18, 1972. The court, consistent with the District Court's alternative holding, was of the opinion that this case is analogous to the annexation cases instead of the voting

POO

rights cases. The Court of Appeals stated that plaintiffs have not been denied any constitutionally protected rights of franchise because they are not bona fide residents of the City of Winston-Salem and have no standing to assert these rights. Plaintiffs believe that they are entitled to relief in this action under the authority of a long line of voting right cases, and for this reason they again petition this court for writ of certiorari.

Plaintiffs' complaint in particular is of an act of the Board of Aldermen of the City of Winston-Salem in its zoning legislative capacity, rezoning a tract of land in close proximity to their residences, from a residential classification to an industrial classification, for the sole purpose of constructing there a garbage dump, or so-called sanitary landfill. (App. 10-11) There are approximately two thousand persons who live within a distance of one and one-half miles of the proposed garbage dump, and it is estimated that sixty percent of these persons live within the one-mile extraterritorial zoning radius surrounding the City of Winston-Salem. (Tr. 28-29)

At its August 21, 1969, meeting, the City-County Planning Board for the City of Winston-Salem and County of Forsyth, voted to recommend to the Board of Aldermen of the City of Winston-Salem that the petition by the City of Winston-Salem be granted for rezoning from classification R-6 and R-5 to classification I-3,

POOR COPY

the property located along Salem Creek three thousand feet north of the West Clemmonsville road and twenty-four hundred feet west of Ebert Road, consisting of eighty-five acres, and being a part of Lot 1, Block 3928, as shown on the Forsyth County tax maps. (App. 6, 15)

On September 16, 1969, the Board of Aldermen of the City of Winston-Salem, adopted the recommendation of the Planning Board and enacted an ordinance amending the City of Winston-Salem Zoning Ordinance and the Official Zoning Map of the City of Winston-Salem, North Carolina. A copy of the amendatory ordinance is set out in the Appendix.

Zoning classifications R-5 and R-6 provide districts with safeguards for areas which are developed or in the process of development predominantly with single family dwellings. The zoning ordinance provides that classification I-3 is to establish a district for industries which generally require specially selected locations, and among the permitted uses under this classification is a sanitary landfill. Sanitary landfills are not permitted uses under either classification R-5 or classification R-6. (App. 7-8, 15) Defendant, in petitioning for rezoning of the area in question, stated that the intended use of sixty acres of the tract would be to operate a sanitary landfill. (App. 8, 15)

This action was commenced on November 4, 1969. Preliminary site clearing operations on the property were begun about October 24, 1969. (App. 8, 15) When this case was heard in district

POOR C

court on December 18, 1969, major construction of the sanitary landfill had not been commenced. (Tr. 33-39)

Soon after defendant City of Winston-Salem announced plans in early 1969 to acquire, rezone, and construct a sanitary landfill on a tract of land located in the area in question, plaintiffs and many of the members of their class and others, formed a voluntary organization for the purpose of opposing these measures. Funds were raised, an attorney was hired, publicity releases were made, various hearings were attended, and requests for help were made to the Forsyth County legislative delegation to the North Carolina General Assembly, and to the Department of Housing and Urban Development, as part of the campaign of this organization. (Tr. 29-34)

The garbage dump in question is one of the four landfills which the City of Winston-Salem proposes to place into operation, so that there will be one landfill in each of the four quadrants of the city. The site which is the subject of this action is located in the southwest quadrant of the city. The landfill proposed for the southeast quadrant of the city, known as the Overdale Road site, is also located in the one-mile extraterritorial zoning area outside the corporate limits of the city. The landfill for the northeast quadrant of the city is a site presently used for dumping purposes near Smith-Reynolds Airport, which is now within the municipal

R COPY

limits, although at the time this site was first put to use as a landfill, it was outside the corporate limits. To date no site has been selected for a landfill in the northwest quadrant of the city. (Tr. 83-84, 89-90, 100-101, 114)

Some of the members of plaintiffs' class live within four hundred feet of the property on which the garbage dump is located. There are three residential subdivisions of substantial size located within approximately two thousand feet of this property. (Tr. 28-29) Very little, if any, residential construction has been commenced within one and one-half miles of the garbage dump site, subsequent to the announcement by the City of Winston-Salem of its intention to acquire the property for this purpose, whereas during the several years prior to the announcement a number of new houses had been constructed in that area. (Tr. 53-65)

Approximately one hundred and twenty five thousand tons of solid waste are being dumped in Winston-Salem's existing landfills each year. The City collects garbage on thirty routes, serving one hundred and forty thousand residents of the city. In addition a number of persons who reside outside the city have their garbage collected by the municipality. Not only municipal garbage trucks deposit their loads at the landfills, but these locations also serve as dumping sites for trucks operated by rural private garbage collection services and

trucks and other vehicles owned by businesses and individuals hauling regular or occasional loads of refuse to the dump. (Tr. 84, 99, 106-107)

Plaintiffs offered the evidence of defendant's practices and conditions prevalent at the principal existing garbage dump, the Link Road site, for the purpose of showing the prospective environmental impact of the new garbage dump. Highly offensive odors frequently emanate from the Link Road dump, permeate the surrounding community, and even infiltrate the interiors of the dwellings in the area. A substantial population of rats have been attracted to the dump. Flies in great swarms are spawned at the dump and are present in surrounding neighborhoods in such numbers that it is impossible to have cook-outs, picnics, and other outside activities in the yards in this area during the summertime. Brush and other inflammable wastes are burned periodically at the dump, and other fires have been ignited by spontaneous combustion in the rubbish piles. Smoke, soot, and ash from these fires have blown in the surrounding environs. Some of the fires have escaped from the landfill area into adjoining grass and brush. On a number of occasions municipal firefighting equipment has been summoned to extinguish blazes at the dump. A steady stream of trucks and other vehicles bringing trash to the dump passes through the access roads in the area, beginning at about 3:00 A.M., and ending at about

midnight, every day. Many of the vehicles used to transport the refuse are not covered, and large quantities of papers and other refuse blow into the yards of the surrounding neighborhoods. (Tr. 40-43, 66-71, 73-78) Methane gas, a highly explosive substance, is a standard product of decaying refuse. There have been several instances of probable methane gas fires at the Link Road site. (Tr. 119-123) Garbage at the Link Road site is not covered and compacted with fill dirt at regular intervals, and many thousands of cubic feet of refuse remain exposed at this site continuously. (Tr. 40-43, 52-53, 66-67)

Defendant offered evidence that the new garbage dump would be operated in a manner superior to that in which the Link Road site has been maintained. (Tr. 87-88, 91-92, 98) Nevertheless, there are certain inherently objectionable qualities even to a well-maintained sanitary landfill. It is probable that there will be some objectionable odors, some rats, more flies than one would find in the usual residential neighborhood, some wind-blown trash, and other undesirable effects. Methane gas, a highly explosive substance, is known to be produced in any landfill, and the exact extent of the dangers of this gas, and the difficulty and efficacy of controlling the gas, were not known by defendant's officers at the time of the hearing, while reports from consultants on this subject were awaited. (Tr. 133-134) There are no

plans to forbid the burning of brush, leaves, and other materials at the new landfill. (Tr. 126) The principal access road to the new landfill is narrow and winding and has two small bridges; it is apparent that travelers on this highway will be endangered and inconvenienced by the heavy traffic of large vehicles going to and from the dump. (Tr. 35-38)

The evidence showed that it was reasonable to anticipate that many of the several hundred dwelling houses located in proximity to the new garbage dump, including those occupied by plaintiffs and the members of their class, would depreciate substantially in value as a result of the construction of this project. (Tr. 58-64)

ARGUMENT

The decision below should be reviewed because the United States Court of Appeals for the Fourth Circuit has decided a federal question in a way in conflict with applicable decisions of this Court, by upholding the district court judgment that denial of the franchise to residents of extraterritorial areas on bodies that make legislative decisions binding upon them, is not in violation of the one man---one vote doctrine.

A board of aldermen elected only by and from residents of the city may not, consistent with the Fourteenth Amendment,

act as the highest zoning legislative body for an area extending one mile beyond the city limits from which the residents are not eligible to vote for or be elected to the board of aldermen, by rezoning property within the one-mile extraterritorial limit for the purpose of permitting a garbage dump to be constructed there.

1. Denial of right of franchise to persons in the extraterritorial zoning area is a denial of equal protection of the laws. The United States Court of Appeals for the Fourth Circuit determined that plaintiffs were not entitled to relief because the reapportionment cases did not affect the validity of the long line of authority of annexation cases giving the state virtually unlimited right to control the boundaries of its municipal subdivisions. The Court was of the opinion that plaintiffs have no standing to assert rights of franchise or equal representation in municipal affairs, because they are not bona fide residents of the City of Winston-Salem.

The Board of Aldermen of the City of Winston-Salem has the final authority to act upon amendments to the Zoning Ordinance of the City. The members of the Board of Aldermen are elected by the voters who reside within the city limits. North Carolina General Statutes, N.C.G.S. 160-181.2 and a public local act, North Carolina Laws 1947, Chapter 677, as amended by Laws 1953, Chapter 777, confer

upon the Board of Aldermen of the City of Winston-Salem the jurisdiction to adopt ordinances zoning and rezoning an area contiguous to the city, in the case of the general statutory provision, an area one mile in width, and in the case of the public local law provision, an area three miles in width. By its Zoning Ordinance of September 17, 1968, Section 29-1, the City of Winston-Salem has assumed zoning jurisdiction over the area within one mile beyond the city limits in all directions.

This statutory arrangement denies the equal protection of the laws to plaintiffs and the members of their class. A citizen's right to vote free of arbitrary impairment by state action is recognized as a right secured by the constitution. Baker v. Carr, 369 U.S. 186 (1962). Plaintiffs and the members of their class have been placed in a position of arbitrary inequality vis-a-vis voters in an irrationally favored district for purposes of zoning. Merely because of the accident of geographic location, plaintiffs are not granted equal rights to vote on an issue of direct concern, the selection of a legislative body with the power to adopt and alter the zoning ordinances governing their place of residence. The principles of the reapportionment cases apply to units of local government engaged in activities of a legislative nature. Avery v. Midland County, 390 U.S. 474 (1968).

POOR COPY

An otherwise qualified voter who is totally excluded from the electoral process, is as much entitled to relief under the one man--one vote doctrine, as the citizen who is underrepresented or unequally represented in the electoral process. Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969). There the court invalidated a state law limiting the franchise in school board elections to property-owners and parents of schoolchildren residing in the district.

When statutes are under review "which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable. . . . Legislation which delegates decision-making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of the voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting." Kramer v. Union Free School District No. 15, supra, 395 U.S. 627-628. The Court did not rule out the possibility that a state may in some circumstances limit the exercise of the franchise only to those primarily interested in or primarily affected by the activities of the elective body, but cautioned, "The

classifications must be tailored so the exclusion of appellant and the members of his class is necessary to achieve the articulated state goal." Kramer v. Union Free School District No. 15, supra, 395 U.S. 632. No rational state interest has been, or can be, suggested by defendant City of Winston-Salem in this case, for excluding the residents of the extraterritorial zoning area from the aldermanic franchise, when the Board of Aldermen is vested with the authority to make the zoning legislative decisions that affect these residents' welfare and property.

The Court of Appeals claimed that the impact of these voting rights cases on the present action could be avoided on the theory that plaintiffs were not bona fide residents of the City of Winston-Salem and hence were without standing to assert their voting rights. This Court will not sustain efforts by states and their subdivisions to brand a sector of the population as non-resident, and on that basis deny them the franchise, when these citizens physically reside in the locale affected by the legislative decisions of the body whose selection is in question. Carrington v. Rash, 380 U.S. 89 (1965). In a case factually analogous to the present action, Evans v. Cornman, 398 U.S. 419 (1970), the Court held that persons who resided in federally-owned enclaves located within the state of Maryland could not be denied the rights to vote in state elections. Jurisdiction over these enclaves had been ceded to the United States by the state. The residents

of these areas were affected in numerous ways by state electoral decisions, such as the passage of state criminal laws, automobile registration and driver licensing, collection of income, gasoline, and sales taxes. On the other hand residents of the federal enclaves did not pay state property taxes and were subject to prosecution only in federal courts. The Court, holding that these citizens could not be consitutionally denied the right to vote in state elections, said, "these differences, along with whatever others may exist, do not come close to establishing that degree of disinterest in electoral decisions that might justify a total exclusion from the franchise." 398 U.S. at 426. In the present case, plaintiffs and other persons who reside in the extraterritorial zoning area are said not to be residents of the city. While they literally do not reside in the city, they are residents of an area over which the city has been given zoning legislative power, which is exercised by the elective board of aldermen. With respect to zoning decisions, plaintiffs and the others who live in the extraterritorial area are vitally interested in and affected by this legislative process. It cannot be said that they possess "that degree of disinterest in electoral decisions that might justify total exclusion from the franchise."

Two state courts have considered directly the question of whether a city may constitutionally exercise zoning jurisdiction over areas occupied by per-

sons to whom it does not extend the franchise. Malone v. Williams, 118 Tenn. 390, 103 S.W. 798, 806 (1907), held that an act granting the City of Memphis authority to exercise zoning authority for two miles beyond the corporate limits was invalid, the court saying, "The control in the present instance is given, not to anyone chosen or elected by the people over whom they are to exercise dominion, but to the officers of a foreign body, and not for the people to be affected by the powers given." Smeltzer v. Messer, 311 Ky. 692, 225 S.W.2d 96, 97-98 (1949), holds purported extraterritorial zoning of a municipality invalid, for one reason because, ". . . the city's action, if sustained, seriously impairs the right of a person owning property beyond its limits who has no voice in its legislative policies, and who receives no legally recognizable benefit to such property from the city government."

The lower courts relied to some extent to statements contained in Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), to the affect that the state has unlimited discretion to modify and withdraw any of the powers of a municipal corporation, including territorial changes, without the consent of the citizens. This broad and sweeping dicta cannot be applied in the circumstances of the present case, in light of Avery v. Midland County, 390 U.S. 474 (1968). The reapportionment cases, and not the annexation cases, provide the correct analogy for consideration of the present case. Here no distinct governmental

unit or district has been created or proposed, as in the annexation cases. Instead, a group of citizens simply have been denied the right to participate in governmental decisions affecting their personal interests. The plaintiffs have no present right and no future right to vote for the members of the legislative body which determines zoning matters affecting their property, while in the annexation cases cited by the district court the plaintiffs were given the right in advance to vote for or against annexation, and in the event they were annexed, they would have the right to participate fully and equally as electors of the municipality.

Petitioners do not contend that the City of Winston-Salem is without constitutional authority to exercise zoning jurisdiction beyond its corporate limits. Petitioners do not contend that the power to enact amendments to zoning ordinances can be vested by state law only in the board of aldermen of the city. But the petitioners do maintain, as is amply supported by the authorities cited above, that if the power to enact and amend zoning ordinances is delegated to the board of aldermen, an elective body, this jurisdiction cannot extend to areas populated by persons who are not accorded the right of participating in aldermanic elections.

2. Injunctive relief to bar the city from constructing the garbage dump, until and unless the rezoning is accomplished

POOR COPY

by a body from whose selection petitioners have not been arbitrarily excluded, is the appropriate remedy. Petitioners have the right to enjoin the construction of a garbage dump pursuant to the unlawfully enacted rezoning ordinance, because their action in district court is an appropriate form of procedure to obtain this objective, and because the attack on the validity of the enactment was timely. Plaintiffs and the members of their class were constant and dedicated in their opposition to the rezoning ordinance, and they exhausted every reasonable political and administrative remedy before having recourse to the federal court. The ordinance was passed on September 16, 1969. This action was commenced on November 4, 1969.

The relevant authority on the appropriateness of an injunctive remedy of the nature sought here, is contained in Cipriano v. Houma, 395 U.S. 701 (1968), and Phoenix v. Kolodziejski, 399 U.S. 204 (1970). In both of these cases state laws were invalidated, where only property taxpayers or property-owners had the right to vote in elections to approve municipal revenue bonds. Each case began as an action in federal district court to enjoin the issuance of the bonds approved at a special election from which plaintiffs had been excluded. The Court held that it was appropriate to grant the injunction, thus vitiating the election and forbidding sale of the bonds, as well as to declare the statute unconstitutional.

so long as under state law the challenge to the election result was timely.

In the present case, applying North Carolina law, the right to test the constitutionality of a zoning ordinance by an action for injunction, following the enactment of the offending ordinance and before the physical changes are effected which the ordinance authorizes or requires, is established beyond question. Schloss v. Jamison, 258 N.C. 271, 128 S.E.2d 590 (1962); Clinard v. Winston-Salem, 217 N.C. 119, 6 S.E.2d 867 (1940).

The Court of Appeals suggested that plaintiffs' victory would be an empty one, because if rezoning the property in question was held to be unconstitutional, the original zoning law would have to be deemed unconstitutional for the same reason, and the property then would become unrestricted so that the municipality would be free to construct the garbage dump. This suggestion overlooks a traditional feature of the law of zoning, together with a well established principle in reapportionment cases. It is traditional in the laws of zoning that pre-existing land uses are accepted and validated, whether or not they were the result of prior zoning laws. And this Court has established that prior laws enacted by a mal-apportioned legislature are not invalid. Fortson v. Morris, 385 U.S. 231 (1966).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Counsel for Petitioners
Norman B. Smith
Smith, Patterson, Follin & Curtis
816 Southeastern Bldg.
Greensboro, N.C. 27401
Telephone: 919-275-8603

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,562

Donald L. Garren and James A. Eddinger,

Appellants

-versus-

City of Winston-Salem, North Carolina,

Appellee.

On Appeal from the United States District Court for the Middle District of North Carolina

---

(Argued November 9, 1970
Decided July 13, 1972)

Before HAYNSWORTH, Chief Judge, MURRAH*, Senior Circuit Judge, and CRAVEN, Circuit Judge.

---

* Of the Tenth Circuit sitting by designation.

POOR CO

Renn Drum, Drum, Liner & Pedden, Winston-Salem, North Carolina (Norman B. Smith, Smith & Patterson, Greensboro, North Carolina, on brief), for Appellants.

William F. Womble and John L. W. Garrou, Winston-Salem, North Carolina (Of Counsel: Womble, Carlyle, Sandridge & Rice, Winston-Salem, North Carolina, on brief), for Appellee.

MURRAH, Senior Circuit Judge

We previously affirmed the District Court's dismissal of this action on the ground that the appellants' claim was concerned only with the infringement of property as opposed to personal rights and did not, therefore, state a claim cognizable under 42 U.S.C. § 1983, for which jurisdiction is conferred under 28 U.S.C. § 1343 (3). See 439 F.2d 140. Our decision was vacated and the case remanded by the Supreme Court for consideration in light of Lynch v. Household Corp., ____ U.S. ____ (March 28, 1972). That case held that there was no jurisdictional distinction between personal liberties and property rights under § 1343(3).

Having previously held, contrary to the trial court's ruling, that Winston-Salem is a person within the meaning of § 1983, amenable to injunctive and declaratory relief for asserted deprivations of a civil right (see 439 F.2d 140, 141), we

COPY

are brought squarely to the merits of appellants' claim of denial of equal protection of the laws. On remand the parties have requested no further briefing and are apparently content with our previous statement of the essential facts and the constitutional issue presented. We accordingly proceed to a decision of the matter as submitted.

For convenience only, we shall restate the pertinent facts and appellants' constitutional claim. The Board of Alderman of Winston-Salem, acting on recommendation of the City-County Planning Board, rezoned eighty-five acres of land owned by the city and located outside its territorial limits from residential to industrial use. This was for the purpose of constructing a sanitary landfill on the property, a permitted use only under the rezoned classification. Both the general statutes (N.C. Gen. Stat. § 160-181.2)[1] and the local public acts (Laws 1947, ch. 677, § 23, et seq., as amended Laws 1953, ch. 777, § 1) of the General Assembly of North Carolina authorize the exercise of extraterritorial zoning powers. The powers asserted by Winston-Salem in this case were exercised

---

1. Repealed by Laws 1971, ch. 698, § 2, effective January 1, 1972.

by the Board of Aldermen, apparently pursuant to the local public acts, supra.[2]

Garren and Eddinger bring this suit on behalf of themselves and all other persons residing in the extraterritorial zoning area and in the vicinity of the rezoned city-owned property who will allegedly suffer irreparable harm by construction of the landfill. They do not question the constitutional power of the state to authorize its municipalities to

---

2. We agree with appellants' contention that the rezoning ordinance here in question was enacted pursuant to the authority specifically conferred on the City of Winston-Salem by the local public acts and that the constitutionality of N.C. Gen. Stat. § 160-181.2 is not directly in question. In these circumstances, the convening of a three-judge court pursuant to 28 U.S.C. § 2281 was not required and, indeed, would have been improper since the local public acts, supra, pertain only to the municipality of Winston-Salem and are not of statewide application. See Board of Regents v. New Left Education Project, ____ U.S. ____ (Jan. 24, 1972); Moody v. Flowers, 387 U.S. 97 (1967); Rorick v. Comm'rs., 307 U.S. 208 (1939). For a brief history of the local public acts in question, see State v. Owen, 242 N.C. 525, 88 S.E.2d 832 (1955).

zone or rezone extraterritorial property.[3] Nor do they contend that the powers asserted here were not exercised in conformity with the enabling statutes. Rather, as explicated in argument and brief, we read the complaint to seek (1) a declaration of unconstitutionality of the local public acts in question to the extent and only to the extent that they grant the City of Winston-Salem power to zone extraterritorial property in a manner which will detrimentally affect the property of non-residents of the municipality who have no representative voice in the election of the municipal body which exercises the zoning powers; and, (2) injunctive relief against enforcement of the rezoning ordinance in question as an unconstitutional exercise of those powers.

---

3. Statutes authorizing municipalities to exercise extraterritorial zoning powers have been upheld in North Carolina as well as other jurisdictions. See, e.g., City of Raleigh v. Morand, 247 N.C. 363, 100 S.E.2d 870 (1957), appeal dismissed, 357 U.S. 343 (1958); Town of Garner v. Weston, 263 N.C. 487, 139 S.E. 2d 642 (1965); Walworth Co. v. City of Elkhorn, 27 Wis.2d 30, 133 N.W.2d 257 (1965); Schlientz v. City of North Platte, 172 Neb. 477, 110 N.W.2d 53 (1961).

POOR

The trial court apparently accepted the municipality's contention that this case is in the nature of cases dealing with municipal annexation powers, the exercise of which are " . . .unrestrained by any provision of the Constitution of the United States." Hunter v. Pittsburgh, 207 U.S. 161, 179 (1907). See also Detroit Edison C. v. East China Township School Dist. No. 3, 247 F.Supp. 296 (S.D. Mich. 1967), aff'd, 378 F.2d 225 (6th Cir. 1967), cert. denied, 389 U.S. 932; Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967), cert. denied, 389 U.S. 975; Hammonds v. City of Corpus Christi, Tex., 343 F.2d 162 (5th Cir. 1967), cert. denied, 382 U.S. 837. International Harvester Company v. Kansas City, 303 F.2d 35 (10th Cir. 1962), cert. denied, 371 U.S. 948. But, correctly read, the "seemingly unconfined dicta of Hunter and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases. . . . Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." Gomillion v. Lightfoot, 364 U.S. 339, 344-345 (1960). This is especially true in the sensitive area of individual voting rights, wherein it is established beyond doubt that state powers may not be exercised to work a discrimination between citizens who stand on an equal footing before the law. See

OOR COPY

Reynolds v. Sims, 377 U.S. 533 (1964); Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964); Dunn v. Blumstein, ___ U.S. ___ (March 2, 1972).

It is in this context that appellants earnestly contend that our case is demonstratively unlike the annexation cases, and constitutionally analogous to the voting rights cases -- particularly the more recent ones extending equal protection of the laws to " . . . the exercise of state power however manifested, whether exercised directly or through subdivisions of the State." Avery v. Midland County, 390 U.S. 474, 479 (1968). See also Kramer v. Union School District, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969).

This is not, however, an orthodox voting rights case. Nor do we think the principles of those cases can be rationalized to support appellants' claim that they have been denied equal protection of the laws as a result of being denied equal voting rights. Appellants have not been denied any constitutionally protected rights of franchise or equal representation in municipal affairs. This is so simply because not being bona fide residents of Winston-Salem they have no standing to assert such rights. See Carrington v. Rash, 380 U.S. 89, 93-94 (1965). Appellants' property is subject to no different zoning restriction or other burdens than the property of municipal residents. And the fact that

POOR

appellants do not enjoy the same recourse to the ballot box is not the result of an invidious or suspect classification, or any other act of overt discrimination. Cf. Gomillion v. Lightfoot, supra. Inasmuch as appellants have not shown themselves to be deprived of any benefit otherwise due them on the basis of an unreasonable or unjustified classification, we have no occasion to consider or apply the compelling state interest test as in Dunn v. Blumstein, supra.

In these circumstances, the case comes down to a situation where the city is zoning and rezoning extraterritorial property which it owns in accordance with its constitutionally conferred statutory powers. "One has no constitutional right to a 'remedy' against the lawful conduct of another." Senn v. Tile Layers Union, 301 U.S. 468, 483 (1937). The remedy for any wrongs which appellants may have suffered or may suffer at the hands of the municipality in the exercise of its extraterritorial zoning powers does not lie under § 1983 of the Civil Rights Act.

Even if appellants' constitutional arguments were to prevail it would be an empty victory. For if the City of Winston-Salem is constitutionally prohibited from rezoning the property in question so as to allow construction of a sanitary landfill, the original zoning of the land would have been constitutionally prohibited for the same reason. The property, thus, would be unrestricted, and the municipality

OOR COPY

would be free to exercise its police power in furtherance of any legitimate governmental function.

The trial court's dismissal of this action is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,562

Donald L. Garren and James A. Eddinger,

Appellants

-versus-

City of Winston-Salem, North Carolina.

Appellee.

On Appeal from the United States District Court for the Middle District of North Carolina

(Argued November 9, 1970
Decided March 2, 1971)

Before HAYNSWORTH, Chief Judge, MURRAH*, Senior Circuit Judge, and CRAVEN, Circuit Judge.

* Of the Tenth Circuit sitting by designation.

OCR COPY

Renn Drum, Drun, Liner & Redden, Winston-Salem, North Carolina (Norman B. Smith, Smith & Patterson, Greensboro, North Carolina, on brief) for Appellants.

William F. Womble and John L. W. Garrou, Winston-Salem, North Carolina (Of Counsel: Womble, Carlyle, Sandridge & Rice, Winston-Salem, North Carolina, on brief) for Appellee.

MURRAH, Senior Circuit Judge

The decision of Winston-Salem to locate a sanitary landfill (also referred to as a garbage dump) in proximity to plaintiffs' property resulted in this suit for declaratory and injunctive relief which the trial court denied. The undisputed facts are that the Board of Aldermen of Winston-Salem, acting on the recommendation of the City-County Planning Board, rezoned eighty-five acres of city land located outside its territorial limits from residential to industrial use. A sanitary landfill is a permitted use only under the rezoned classification.

Both general and local public acts of the General Assembly of North Carolina authorize the exercise of the extra-territorial zoning powers asserted by Winston-Salem in this case.[1] These

1. North Carolina General Statutes §160-181.2; Laws 1947, Ch. 667-§23; Laws 1953, Ch. 777-§1.

POOR

powers are exercised by the Board of Aldermen who are elected only by the residents of Winston-Salem.

Garren and Eddinger bring this suit in behalf of themselves and all other persons residing within the one mile extraterritorial zoning area and particularly all persons who will suffer alleged irreparable harm by construction of the landfill. As we read it, the Complaint alleges in substance and effect that Section 160-181.2, North Carolina General Statutes, deprives plaintiffs of the equal protection of the laws by subjecting them to the zoning powers of the Board of Aldermen while denying them the right to vote in aldermanic elections thus working an irreparable injury to their property rights for the redress of which no adequate remedy at law is available.

As explicated in argument and brief, we read the prayer to seek (1) a declaration of the unconstitutionality of the special act to the extent and only to the extent that it grants the City of Winston-Salem extraterritorial zoning powers without according nonresident citizens who are affected thereby the right of representation in the aldermanic elections for those who exercise such extraterritorial powers and (2) injunctive relief against enforcement of the rezoning ordinance as an unconstitutional exercise of those powers. No attack is made on the face of the general statutes.

OR COPY

Jurisdiction is asserted under the Civil Rights Act, 42 U.S.C. Section 1983, and 28 U.S.C. Section 1343(3), which specifically confers federal jurisdiction over claims arising under Section 1983. The Complaint does not undertake to allege the requisite amount in controversy to confer federal question jurisdiction under 28 U.S.C. Section 1331.

Upon trial, Judge Gordon dismissed the suit because (1) a municipality is not a person within the meaning of 42 U.S.C. Section 1983 and (2) the action complained of is in the nature of an annexation as to which the one man-one vote requirement of the Equal Protection Clause as vitalized in the reapportionment cases is inapplicable. We affirm the judgment but for different reasons than those stated in the trial judge's opinion.

Judge Craven, speaking for a three judge court in Atkins v. City of Charlotte, 296 F.Supp. 1068 (W.D.N.C.), held that 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3) may be invoked against a municipality where the only relief sought is injunctive or declaratory in nature to redress the deprivation of a civil right. Only declaratory and injunctive relief is sought here. And we hold with Atkins v. City of Charlotte, supra, that Winston-Salem is a person within the meaning of Section 1983 amenable to a claim for equitable redress founded upon the alleged deprivation of a civil right.

POOR

But we are nevertheless convinced by the heavy weight of the case law that plaintiffs have not stated a claim cognizable under Section 1983 for which jurisdiction is conferred by Section 1343(3). The language of Section 1983 granting redress for the deprivation of any right, privilege or immunity has been consistently construed to embrace only a right, privilege or immunity pertaining to "personal liberty, not dependent for its existence upon the infringement of property rights," i.e. see Hague v. Committee for Industrial Organization, 307 U.S. 496 at 531 (Mr. Justice Stone's opinion); Weddle v. Director, Patuxent Institution, _____F.2d _____ (4th Cir.). See also Eisen v. Eastman, 421 F.2d 560 (2d Cir.); Howard v. Higgins, 379 F.2d 227 (10th Cir.); Bradford Audio Corporation v. Pious, 392 F.2d 67 (2d Cir.); City of Boulder v. Snyder, 396 F.2d 853 (10th Cir.); Martin v. King, 417 F.2d 458 (10th Cir.); Willis v. Reddin, 418 F.2d 702 (9th Cir.). "Where, as here, the infringement is one solely of property rights, §1331 is the jurisdictional statute, and jurisdiction may be sustained only upon satisfaction of the amount in controversy requirement." Weddle v. Director, Patuxent Institution, supra at _____.

Plaintiffs do not seek to vindicate a suffrage right either by compelling their participation in aldermanic elections or in any other manner. The suffrage right is presented only in the

OOR COPY

context of alleged impairment of a property right and seeks only the vindication of that interest.

The trial court properly dismissed the Complaint for failure to state a claim cognizable under Section 1983. The judgment is affirmed.

POOR

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

DONALD L. GARREN and JAMES A. EDDINGER, Plaintiffs	)	
v.	)	No. C-228-WS-69
CITY OF WINSTON-SALEM, NORTH CAROLINA, Defendant	)	

Norman B. Smith, Greensboro, North Carolina, and Renn Drum, of Drum, Liner & Redden, Winston-Salem, North Carolina, for the Plaintiffs

W. F. Womble and John L. Garrou, of Womble, Carlyle, Sandridge & Rice, Winston-Salem, North Carolina, for the Defendant

MEMORANDUM OPINION AND ORDER

GORDON, District Judge

This case coming on to be heard and being heard before the undersigned, United States District Judge for the Middle District of North Carolina, upon the

OR COPY

motion by the plaintiffs for a preliminary and permanent injunction, and it being stipulated by and between counsel that the case might be heard on its merits for final and complete relief prayed for by the plaintiffs, and it being so heard, and the Court having heard all of the evidence offered by the parties, and having received and considered briefs submitted by counsel for both parties, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Plaintiffs are citizens and residents of Forsyth County, North Carolina. Defendant is a municipal corporation chartered by the State of North Carolina, and located within the boundaries of Forsyth County, North Carolina. Plaintiffs bring this action pursuant to 42 U.S.C. §1983, 28 U.S.C. §1343, and 28 U.S.C. §2201.

Defendant owns an eighty-five acre tract of land near Salem Creek and Ebert Road, which tract lies outside of but within one mile south of the corporate limits of the City of Winston-Salem. On August 21, 1969, the City-County Planning Board for the City of Winston-Salem and County of Forsyth voted to recommend to the Board of Aldermen of the City of Winston-Salem that the petition of the defendant to rezone this property from a residential classification to an industrial classification be granted. On

POOR

September 16, 1969, the Board of Aldermen for the City of Winston-Salem adopted this recommendation, and the resulting ordinance was effective from and after this adoption. These acts performed by the City-County Planning Board and the Board of Aldermen were done pursuant to authority vested in them by the General Assembly of North Carolina.[1]

Defendants propose to construct a sanitary landfill on approximately sixty acres of this tract and plan to use another part of this same tract for sludge drying beds at an existing sewerage treatment plant. These uses of this tract would not have been permitted without the change from residential to industrial zoning restrictions.

Plaintiffs contend that since they do not reside within the corporate limits of the City of Winston-Salem and therefore do not have the right to vote in the election in which the Board of Aldermen are chosen, they have been denied equal protection of the laws, in that this body caused a zoning change for property adjacent to their own which will adversely affect their interests.

---

[1] North Carolina General Statutes §160-181.2; Laws 1947, Ch. 677--§23; Laws 1953, Ch. 777--§1.

OR COPY

CONCLUSIONS OF LAW

A three-judge district court pursuant to 28 U.S.C. §§2281, et seq., is not necessary due to the limited nature of this action. Ex Parte J. D. Collins, 277 U.S. 565, 48 S. Ct. 585, 72 L. ed. 990 (1928).

42 U.S.C. §1983 is not applicable to this action. A municipal corporation is not a "person" as the word is used in this particular section. Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. ed. 2d 492 (1961).

This action taken by the Board of Aldermen was in the nature of an annexation for the purpose of zoning, and although the equal protection clause applies to local government reapportionment, it does not follow that it should be equally applicable to annexation cases. Detroit Edison Co. v. East China Township School District No. 3, 247 F. Supp. 296 (E.D. Mich. 1965); affirmed 378 F. 2d 225 (6 Cir. 1967); cert. den. 389 U.S. 932, 88 S. Ct. 296, 19 L. ed. 2d 284 (1967). In Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L. ed. 151 (1907), the court stated:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to

them. . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. . . The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and

> there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it." (Emphasis added) 52 L. ed. at 159.

The holding of this case as it affects an annexation situation has not lost its vitality by reason of the more recent reapportionment cases. See Detroit Edison Company v. East China Township District No. 3, supra, and Deane Hill Country Club, Incorporated v. City of Knoxville, 6 Cir., 379 F. 2d 321 (1967), cert. den. 389 U.S. 975, 88 S. Ct. 476, 19 L. ed. 2d 467 (1967).

THEREFORE, IT IS ORDERED that defendant's motion to dismiss this action with prejudice be and the same hereby is granted.

/s/ Eugene A. Gordon
United States District Judge

February 20, 1970

NORTH CAROLINA GENERAL STATUTES 160-181.2

The legislative body of any municipality whose population at the time of the latest decennial census of the United States was one thousand two hundred fifty (1,250) or more, may exercise the powers granted in this article not only within its corporate limits but also within the territory extending for a distance of one mile beyond such limits in all directions; provided, that any ordinance intended to have application beyond the corporate limits of the municipality shall expressly so provide, and provided further that such ordinance shall be adopted in accordance with the provisions set forth herein...

As a prerequisite to the exercise of such powers, the membership of the zoning commission or planning board charged with the preparation of proposed regulations for the one-mile area outside of the corporate limits shall be increased to include additional members who shall represent such outside area. The number of additional members representing such outside area shall be equal in number to the members of the planning board or zoning commission, appointed by the governing body of the municipality. Such additional members shall be residents of the one-mile area outside the corporate limits and shall be appointed by the board of county commissioners of the county wherein the municipality is situated. Such members shall have equal rights, privileges, and duties with the other members

of the zoning commission or planning board in all matters pertaining to the regulation of such area, both in preparation of the original regulations and in consideration of any proposed amendments to such regulations; provided, that the municipal legislative body may if it deems wise, provide in its ordinance that such additional members shall have equal rights, privileges, and duties with the other members in all matters, wherever they might arise.

In the event that a municipal legislative body adopts zoning regulations for the area outside its corporate limits, it shall increase the membership of the board of adjustment by adding five additional members, and by adding alternate members equal to the number of alternate members appointed to the existing board of adjustment. Such members shall be residents of the one-mile area outside the corporate limits and shall be appointed by the board of county commissioners of the county wherein the municipality is situated. Such members shall have equal rights, privileges, and duties with the other members of the board of adjustment in all matters pertaining to the regulation of such area; provided, that the municipal legislative body may, if it deems wise, provide in its ordinance that such additional members shall have equal rights, privileges, and duties with the other members in all matters, wherever they might arise. The concurring vote of eight members of such enlarged board shall be necessary to reverse any order,

requirement, decision, or determination of any administrative official charged with the enforcement of an ordinance.

In the event the board of county commissioners fails to make the appointments provided for in this section within ninety (90) days after receipt of a resolution from a municipal governing body requesting that such appointments be made, the municipal governing body may thereupon make such appointments....

NORTH CAROLINA LAWS 1947, Ch. 677

Sec. 23. Zoning. The city and the county may jointly or separately confer upon the joint City and County Planning Board the authority and the duty of recommending revisions of existing zoning ordinances or preparing new zoning ordinances or resolutions for the city or county or any portion thereof, in accordance with the present zoning ordinance of the City of Winston-Salem and any amendments thereto and in accordance with the authority for county zoning as herein authorized.

Wherever in this act the City Planning Board or the Board of Aldermen of the City of Winston-Salem or the Board of Adjustment of the City of Winston-Salem are given authority in the territory outside of the corporate limits of the City of Winston-Salem, the exercise of such authority beyond one mile from the corporate limits of the City of Winston-Salem shall be subject to the approval of the Board of Commissioners of Forsyth County.

Sec. 25. Grant of Power. The Board of Commissioners for the County of Forsyth is hereby empowered, in accordance with the conditions and procedure specified in the subsequent Sections of this Act, by resolution to regulate any portion or portions of Forsyth County which lie outside of the zoning jurisdiction of incorporated cities and towns, the location, height, bulk, and size of buildings and other structures, the percentage of lot

which may be occupied, the size of yards, courts, and other open spaces, the density and distribution of population, the uses of buildings and structures for trade, industry, residence, recreation, public activities or other purposes, and the uses of land for trade, industry, residence, recreation, agriculture, water supply, conservation, forestry or other purposes.

Sec. 26. Zoning-Conferring of Authority on Planning Board. In order to avail itself of the zoning powers conferred by this Act, the board of county commissioners may confer upon the County Planning Board or the joint City and County Planning Board the additional power and duty of performing the zoning functions herein defined.

Sec. 42. Validity. If any Section, clause, provision or portion of this Act shall be held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not effect or impair any other Section, clause, provision or portion of the ordinance.

NORTH CAROLINA LAWS 1953, Ch. 777

Sec. 1. Chapter 677 of the Session Laws of 1947 is hereby amended as follows:...(d) That Section Twenty-three be amended as follows: by inserting between the first and second paragraph thereof the two following paragraphs:

"For the purpose of promoting the health, safety, morals and the general welfare of the City of Winston-Salem and its inhabitants and in order to give full effect to the zoning ordinance of the City of Winston-Salem, as amended from time to time, said zoning ordinance, together with the zone map, and any amendments thereto hereafter adopted, shall operate and have effect within three miles of the corporate limits of the City of Winston-Salem, as now or hereafter established. The Board of Aldermen of the City of Winston-Salem may adopt ordinances from time to time zoning and rezoning all or so much of said three-mile area as, within the judgment of the board, should be brought under the operation and effect of the city zoning ordinance. The board of adjustment and the administrative officer, within said three-mile area, shall have and may exercise all the powers and duties now or hereafter conferred upon them by the zoning

ordinance of the City of Winston-Salem.

The extension of said zoning ordinance to said three-mile area and the ordinance adopted by the Board of Aldermen of the City of Winston-Salem from time to time shall conform with the general development plan for this area, if and when promulgated by either of the planning boards herein created."

NORTH CAROLINA LAWS 1949, Ch. 851

Sec. 1. There shall be elected in Forsyth County at the general election to be held in the year 1950, and every two years thereafter, by the duly qualified voters thereof, a board of county commissioners composed of five persons who shall serve for a term of two years from the first Monday in December after their election and until their successors are elected and qualified.

CHARTER OF THE CITY OF
WINSTON-SALEM, NORTH CAROLINA

****

Article 2, Sec. 12A-First. Elections in Winston-Salem; biennial election of mayor. On the first Saturday in May one thousand nine hundred and thirty-three, and on the first Saturday in May biennially thereafter, there shall be elected a mayor, who shall be a resident of the City of Winston-Salem. All persons voting for mayor shall cast their ballots in the respective wards in which said voters reside, and the person receiving the highest number of the aggregate of the votes of all the wards for the office of mayor shall be duly declared elected.

Second. Election of Aldermen. There shall, on the first Saturday in May, 1933, and on the first Saturday in May biennially thereafter, be elected eight aldermen for said city, who shall hold their offices until their successors are qualified, of whom one shall be elected from South Salem Ward, one from North Salem Ward, one from West First Ward, one from East Ward, one from West Second Ward, one from East Second Ward, one from South Third Ward, and one from North Third Ward. Such aldermen shall be residents of the wards for which they are chosen, and shall be elected by the qualified voters of such wards respectively.

.....

Sixth. Registration. It shall be

the duty of the board of aldermen of the City of Winston-Salem to cause a registration to be made of all the qualified voters residing therein under the rules and regulations prescribed for the registration of voters for general elections. The board of aldermen may, when it deems the same necessary, order a new registration of voters, and unless such new registration shall be ordered, the election shall be held under the existing registration, with such revision as is herein provided.

....

Seventeenth. Qualifications of voters; removal from one precinct to another. All qualified electors who have resided for one year in the state of North Carolina and for four months immediately preceding an election within the limits of any voting precinct of the City of Winston-Salem, and not otherwise, shall have the right to vote in such precinct; provided, that a qualified elector who shall have resided in the City of Winston-Salem four months immediately preceding an election shall not be deprived of his right to vote by reason of his having moved from one voting precinct into another within such period, but such elector may register and vote in the precinct from which he has moved.

A voter, otherwise qualified, residing within any territory annexed to the City of Winston-Salem on January 1, 1949, or for four months next preceding

the elections to be held in May and June 1949, shall be deemed a resident of the respective ward, including such annexed territory, and shall be eligible to vote in such elections. This provision shall likewise apply to any future extension of the city limits and to the next succeeding elections.

CODE OF ORDINANCES OF
THE CITY OF WINSTON-SALEM

****

Sec. 29-1. Title; Authority for Adoption. The following comprehensive zoning ordinance, to be known as THE WINSTON-SALEM CITY ZONING ORDINANCE, is adopted pursuant to the authority of Article 14, Chapter 160, as amended, of the General Statutes of North Carolina and Chapter 677 of the 1947 Session Laws of North Carolina, as amended. As a part of this ordinance, there is hereby designated a map to be known as the "Official Zoning Map of the City of Winston-Salem, N.C." covering all of the areas within the corporate limits of the City of Winston-Salem and all the area within one (1) mile beyond said corporate limits in all directions, which Official Zoning Map is incorporated herein by reference and made a part of this ordinance, said map being identified as a map consisting of 140 numbered sheets each of which is entitled: "Official Zoning Map of the City of Winston-Salem, N.C., adopted as a part of the Winston-Salem City Zoning Ordinance by the Board of Aldermen on the 16th day of September, 1968," and signed by Lewis Cutright, City Secretary, City of Winston-Salem, the original of which map (hereinafter referred to as the "Official Zoning Map") is and shall remain on file and available to the public in the office of the City-County Planning Board, Winston-Salem, North Carolina.

....

Sec. 29-20. Amendments. Proposals to amend, supplement, change, modify or repeal any of the regulations or the district boundaries established by this ordinance or hereafter established, may be initiated by the Board of Aldermen, by the City-County Planning Board, or by petition of any interested person. A petition by an interested person (which term shall include a partnership and a corporation) to amend or change the regulations or district boundaries shall be submitted to the Board of Aldermen through and reviewed by the Planning Board, which shall consider its merit and make a recommendation to the Board of Aldermen. In no case shall final action by the Board of Aldermen be taken amending, changing, supplementing, modifying, or repealing the regulations established by this ordinance or changing the district boundaries hereby established until a public hearing has been held by the Board of Aldermen at which parties in interest and citizens shall have an opportunity to be heard. A notice of such public hearing shall be given once a week for two successive calendar weeks in a newspaper published in Winston-Salem, the first publication of said notice being not less than 15 days prior to the date fixed for the hearing.

ORDINANCE OF THE CITY OF WINSTON-SALEM
ENACTED SEPTEMBER 16, 1969

BE IT ORDAINED by the Board of Aldermen of the City of Winston-Salem, as follows:

Section 1. The Winston-Salem City Zoning Ordinance and the Official Zoning Map of the City of Winston-Salem, N.C., are hereby amended by changing from R6 and R5 to I3 the zoning classification of the following described property:

BEGINNING at a point in the north line of property of the City of Winston-Salem, said point also being the southwest corner of Lot 5, Block 3928 as shown on the Forsyth County Tax Maps; running thence in a northwesterly direction 1079.76 feet more or less to a point; running thence in a southwesterly direction approximately 288.42 feet to a point; running thence in a northwesterly direction approximately 634.26 feet to a point in the east bank of Salem Creek; running thence in a northeasterly direction with the east bank of Salem Creek 1675 feet more or less to a point; running thence with the eastern boundary of Lot 6 the following seven directions and distances: Northeast approximately 264 feet to a point, northeast 220.44 feet more or less to a point, northeast approximately 165 feet to a point, northwest approximately 106.26 feet to a point, northeast 231 feet more or less to a point, northeast approximately 123.4 feet to a point, and northwest approximately 33 feet to a

point in the east bank of Salem Creek; running thence in a northeasterly direction along the east bank of Salem Creek approximately 1050 feet to a point; running thence in a southeasterly direction on a new line approximately 600 feet to a point; running thence in a southwesterly direction on a new line approximately 850 feet to a point, being the northwest corner of Lot 4; running thence in a southwesterly direction along the west line of Lot 4 approximately 1494.9 feet to a point, being the northwest corner of Lot 5; running thence in a southwesterly direction along the west line of Lot 5 approximately 1326.6 feet to the place of beginning, containing 84.68 acres more or less; being a part of Lot 1, Block 3928 as shown on the Forsyth County Tax Maps as they are presently constituted.

Section 2. This ordinance shall be effective from and after its adoption.

LE COPY

Sup. Ct., U. S.
FILED
OCT 21 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-479

Donald L. Garren and James A. Eddinger,

Petitioners

v.

City of Winston-Salem, North Carolina,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

****

Counsel for Respondent

William F. Womble
Womble, Carlyle, Sandridge & Rice
P. O. Drawer 84
Winston-Salem, N. C. 27102

John L. W. Garrou
Womble, Carlyle, Sandridge & Rice
P. O. Drawer 84
Winston-Salem, N. C. 27102

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 479

Donald L. Garren and James A. Eddinger,

Petitioners

v.

City of Winston-Salem, North Carolina,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

****

Counsel for Respondent

William F. Womble
Womble, Carlyle, Sandridge & Rice
P. O. Drawer 84
Winston-Salem, N. C. 27102

John L. W. Garrou
Womble, Carlyle, Sandridge & Rice
P. O. Drawer 84
Winston-Salem, N. C. 27102

INDEX

Table of Citations ii

Statement of the Case 1

Argument 4

I. The Court of Appeals was correct in holding that the appellants have been denied no rights of equal protection 4

II. Certiorari would be inappropriate because the object of this action is not to redress the deprivation of constitutional rights and a favorable decision on the constitutional question would not entitle the plaintiffs to the relief prayed for. 8

III. There were adequate non-federal grounds for the decisions of the lower courts -- a municipality is not subject to zoning regulations. 17

IV. Conclusion 24

TABLE OF CITATIONS

CASES:

Baker v. Carr, 369 U.S. 186 (1962) 13

Cedar Rapids v. Cox, 252 Iowa 948, 964, 108 N.W.2d 253, 262, 263 13

Cipriano v. City of Houma, 395 U.S. 701 (1969) 5, 14

City of Scottsdale v. Municipal Court of the City of Tempe, 368 P.2d 637 (Ariz. 1962) 21

Clinard v. City of Winston-Salem, 217 N.C. 119, 6 S.E.2d 867 (1940) 22

Dean Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967) 6

Detroit Edison Co. v. East China Township District No. 3, 247 F. Supp. 296 (E.D. Mich. 1965) affirmed, 378 F.2d 226 (6th Cir. 1967) cert. denied, 389 U.S. 962 (1967) 6

Flast v. Cohen, 392 U.S. 83, 102 (1968) 15

Fortson v. Morris, 385 U.S. 231 (1966) 10, 11, 12

Fortson v. Morris, 385 U.S. 231 (1966) 10, 11, 12
Garren v. City of Winston-Salem, 439 F.2d 140 (1971) 2
Hague v. C.I.O., 307 U.S. 496 2
Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) 6
James v. City of Charlotte, 183 N.C. 630, 112 S.E. 15 (1915) 19
Johnson v. Genessee County, 252 F. Supp. 567 (E.D. Mich. 1964) 14
Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 13
Lynch v. Household Finance Corp. 405 U.S. _____ 1972 2
Maryland Committee For Fair Representation v. Tawes, 377 U.S. 656 (1964) 14
Matthews v. Hadley, 361 U.S. 127 (1959) 14
McKinney v. City of High Point, 237 N.C. 66, 74 S.E.2d 440 (1952) 19
People V. O'Neil, 33 Ill. 2d 164, 210 N.E.2d 526 (1965) 14
People v. Turner, 32 Ill. 2d 212, 205 N.E.2d 33 (1965) 14
Phoenix v. Kolodziejski, 399 U.S. 204 (1970) 5, 14

Pierre v. Jordan, 333 F.2d 951 (9th Cir. 1964) 16
Ratner v. City of Richmond, 201 N.E.2d 49 (Ind. 1964) 22
Reynolds v. Sims, 377 U.S. 533 (1964) 14
Scales v. City of Winston-Salem, 189 N.C. 469, 127 S.E. 543 (1925) 18
Schloss v. Jamison, 258 N.C. 271, 128 S.E.2d 590 (1962) 22
State ex rel Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960) 21

STATUTES:

1947 Session Laws of North Carolina, Chapter 677 17
1953 Session Laws of North Carolina, Chapter 777 1, 17
North Carolina General Statutes § 160-181.1 21
North Carolina General Statutes § 160-181.2 1
28 U.S.C. §1253 7
28 U.S.C. §1343 16
42 U.S.C. §1983 2, 15, 16

STATEMENT OF CASE

The Board of Aldermen of the City of Winston-Salem decided that the City needed to establish additional sanitary landfills in order to dispose of its solid waste. The plan was to purchase three tracts, in addition to the one already owned in the northeast quadrant of the City, in order to serve the four quadrants of the City. The City purchased the tract that is the subject of this lawsuit to serve the southwest quadrant of the City. This tract was located within one mile of the City limits of the City of Winston-Salem and, thus was subject to the extraterritorial zoning powers granted to municipalities of over 1250 population by North Carolina General Statutes, § 160-181.2 and granted specifically to the City of Winston-Salem by Chapter 777 of the 1953 Session Laws of the General Assembly of North Carolina. Acting under this authority, the Board of Aldermen had on September 16, 1968, zoned the property R-5 and R-6, restrictive classifications for areas of single-family dwellings. Pursuant to this same authority, on September 16, 1969, the Board of Aldermen rezoned the property from R-5 and R-6 to I-3,

an industrial classification which, unlike classifications R-5 and R-6, would permit the construction of the sanitary landfill.

The plaintiffs live approximately 1200 and 4200 feet, respectively, from the landfill site. They brought this action to enjoin the use of the property for a sanitary landfill.

The District Court, after a hearing on the merits, dismissed the complaint for failure to state a claim cognizable under 42 U.S.C. § 1983 and the plaintiffs' appealed. The Court of Appeals affirmed the District Court on the basis that the plaintiffs' claim was one for the infringement of property rights and therefore not a violation of § 1983, citing Hague v. C.I.O, 307 U. S. 496. Garren v. City of Winston-Salem, 439 F. 2d 140 (1971). The plaintiffs petitioned for certiorari to this Court and the Court vacated the decision of the Court of Appeals in the light of Lynch v. Household Finance Corp., 405 U. S. ____ (1972). On remand the Court of Appeals again affirmed the District Court on the basis that the plaintiffs were not denied equal protection and that even if their constitutional rights had been violated,

they would not be entitled to the relief they sought.

I.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE APPELLANTS HAVE BEEN DENIED NO RIGHTS OF EQUAL PROTECTION.

While, it is submitted, it was unnecessary for the Court of Appeals to reach the constitutional issue in this case, it decided that issue correctly. The plaintiffs are not residents of the City of Winston-Salem. While conceding this, they contend that because the City of Winston-Salem has the power to zone real property within one mile of its borders, the plaintiffs should be given the right to vote in municipal elections. The Court of Appeals simply concluded that the plaintiffs' conclusion did not follow from its premise. It was the decision of that Court that to treat nonresidents of the City differently from residents with respect to voting rights is not discrimination, invidious or otherwise, but is, in fact, a reasonable classification. The property that is the source of this litigation and that was rezoned by the City of Winston-Salem is not the plaintiffs' property, but is property belonging to the City itself. As the Court of Appeals stated:

"The case comes down to a situation where the City is zoning and rezoning extraterritorial property which it owns in accordance with its constitutionally conferred statutory powers." ____ F. 2d at _____.

The fact that, as nonresidents, the plaintiffs were not given the right to vote for the body that exercised this statutorily conferred right gives rise to no constitutional violation.

The voting rights cases cited by the petitioners have no bearing on this case. This is not a case in which the plaintiffs are seeking the right to vote in municipal elections; rather, they are seeking to enjoin the construction of a landfill on City-owned property on the ground that the property was rezoned by a malapportioned body. The petitioners do not assert even the most tenuous connection between the constitutional rights they assert have been violated and the relief they seek. Such decisions as Cipriano v. Houma, 395 U.S. 701 (1968) and Phoenix v. Kolodziejski, 399 U.S. 204 (1970), are not even remotely in point. In those cases, the relief sought was the right to vote; in this

case, the relief sought is an injunction against the construction of a landfill. The distinction is fundamental.

The Court of Appeals cast doubt on the continuing validity of this Court's decision in Hunter v. City of Pittsburgh, 207 U. S. 161 (1907), and correctly held that even if that decision is no longer valid, the plaintiffs would be entitled to no relief here. It should be noted, however, that several lower courts have held that Hunter has not lost its vitality by reason of the reapportionment cases. See Dean Hill Country Club, Inc. v. City of Knoxville, 379 F. 2d 321 (6th Cir., 1967); Detroit Edison Co. v. East China Township District No. 3, 247 F. Supp. 296 (E.D. Mich.,1965), affirmed, 378 F. 2d 226 (6th Cir., 1967), cert. denied, 389 U. S. 962 (1967).

This Court may feel that the Hunter case is no longer applicable and that the lower court cases holding that the reapportionment cases do not affect its validity are incorrectly decided. It is submitted, however, that not only should such a reexamination of Hunter be by direct appeal

under the provisions of 28 U.S.C. § 1253 from the decision of a three-judge court, but that the reexamination should be accomplished in a case where relief appropriate to the issues raised is requested. Here, as the subsequent sections of this brief will point out, there is no connection between the relief the petitioners are seeking and the constitutional violations they assert.

II.

CERTIORARI WOULD BE INAPPROPRIATE BECAUSE THE OBJECT OF THIS ACTION IS NOT TO REDRESS THE DEPRIVATION OF CONSTITUTIONAL RIGHTS AND A FAVORABLE DECISION ON THE CONSTITUTIONAL QUESTION WOULD NOT ENTITLE THE PLAINTIFFS TO THE RELIEF PRAYED FOR.

It is submitted that the fundamental difficulty with the petitioners lawsuit is that they have never established a connection between the relief they seek, the elimination of the landfill, with the business of the Federal Courts. In the District Court, the Court of Appeals, in this Court in the first petition for certiorari and now in this Court again, the plaintiffs have yet to hint at a reason why their being "disenfranchised" in the manner alleged entitles them to enjoin the construction of the sanitary landfill. Consequently, this case would be inappropriate for the granting of certiorari, no matter how the members of this Court might feel about the ostensible question raised in the Petition, that of whether the petitioners as residents of the one-mile area surrounding the City of Winston-Salem subject to its

zoning powers, should have the right to vote for members of the Board of Aldermen.

As the Court of Appeals pointed out, if the petitioners are correct in their contention that the local act permitting the City of Winston-Salem to zone property outside of its borders is unconstitutional in that it does not provide for a means by which the petitioners and members of their class may vote for the body exercising that power, a decision upholding their contention would either have prospective or retroactive effect and either all zoning ordinances passed pursuant to it by improperly constituted boards would be invalid or only future ordinances enacted pursuant thereto would be so. In neither case would the petitioners be entitled to any relief here. On the other hand, if the petitioners are not attacking the constitutionality of the enabling act, they are in effect saying that an act validly performed pursuant to a valid delegation of power by the General Assembly is invalid, a non sequitur. If the general statute permitting extraterritorial zoning by municipalities is constitutional, it is a legal impossibility for a zoning ordinance enacted pursuant to it to be

unconstitutional so long as the ordinance is within the delegated power.

The petitioners' answer to this difficulty is that "it is traditional in the laws of zoning that preexisting land uses are accepted and validated, whether or not they were the result of prior zoning laws. And this Court has established that prior laws enacted by a malapportioned legislature are not invalid. Fortson v. Morris, 385 U.S. 231 (1966)." (Petition for Writ of Certiorari p. 22). The fact that preexisting uses are permitted under zoning ordinances is, of course, irrelevant. It is not the preexisting use that is the issue here, but the future use of the property. Surely, the petitioners cannot mean that under the law of zoning adjoining property owners may enjoin a neighboring property owner to continue a preexisting use. The petitioners' argument that prior laws enacted by a malapportioned legislature are valid is equally ineffective in overcoming this fundamental difficulty. In fact, the case of Fortson v. Morris is supportive of the respondent's position that no act of a malapportioned legislative body may be enjoined. It held that a malapportioned legislature could not be enjoined from selecting a governor.

The theory of the petitioners' case seems to be that they, as voters, can enjoin a single isolated act of a legislative body on the ground that the petitioners were not entitled to vote for the members of that body. The petitioners cite no cases here or in the Courts below to support their theory. The only attempt at distinction between the zoning ordinance attacked here and every other extraterritorial zoning enactment of the Board of Aldermen of the City of Winston-Salem that can be gleaned from the petitioners' brief and arguments is that they are basing their right to an injunction on this one and not on the others. Apparently, their contention is that a litigant may select those enactments of a malapportioned legislative body that he disapproves of and have them struck down, being at the same time careful not to disturb the legislation that he considers beneficial to his interest. The petitioners would go even further. They would not only enjoin the legislative act itself, but what they perceive to be the consequences of that act, the construction of the landfill. There is no basis in law for such an injunction. In Fortson v. Morris, supra, this Court held that a legislature could not be enjoined from selecting a governor because the legislature was

malapportioned. In Fortson, the issue was simply the election of the governor. Had the injunction been sought not against the election of the governor but against a specific act done by the governor and even further some purported result of that act, the facts would be even more analogous to those in this case.

In support of their theory, the petitioners allege in their complaint and have asserted throughout that they have consistently voiced their opposition to the proposed landfill site and feel that the action brought is timely. Conceivably, there are those who have consistently voiced their support for establishing the landfill where it was located and who live within one mile of the corporate limits of the City of Winston-Salem. Had the Board of Aldermen declined to rezone the property, presumably these people could have attacked the R-5 and R-6 classifications on the same grounds asserted here. By the petitioners' logic, they would have been entitled to an injunction invalidating the R-5 and R-6 classifications. If the petitioners' theory were sound, any person residing within one mile of the corporate limits could ignore any particular zoning ordinance of which he

disapproved and, at the same time, claim the benefit and protection of any such ordinance of which he approved. Neither logic nor law supports such a proposition.

The petitioners would have their case analogized to the reapportionment cases. Again, the dichotomy asserts itself. In the reapportionment cases, as their popular name implies, the attack was directed solely at the constituency of the elected body, not the validity of the acts done by the body, nor the consequences of those acts. The effect of the findings of the courts in those cases was that the governing body in question had to be reapportioned, not that its acts were invalid. As was stated by Mr. Justice Douglas in his separate opinion in Baker v. Carr, 369 U. S. 186 (1962):

> "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature, empowered to act (Cedar Rapids v. Cox, 252 Iowa 948, 964, 108 N.W. 2d 253, 262, 263; c.f. Kidd v. McCanless, 200 Tenn. 273, 292 S.W. 2d 40) is plainly correct."

Id. at 250 n. 5; see also People v. Turner, 32 Ill. 2d 212, 205 N.E. 2d 33 (1965); People v. O'Neil, 33 Ill. 2d 164, 210 N.E. 2d 526 (1965); Johnson v. Genessee County, 252 F. Supp. 567 (E.D. Mich. 1964).

In Reynolds v. Sims, 377 U. S. 533 (1964), this Court assumed that the invalidly apportioned Alabama legislature retained the power of legislative action and in Maryland Committee for Fair Representation v. Tawes, 377 U. S. 656 (1964), this Court recognized the "inherent power" of the Maryland legislature even though it was elected in violation of constitutional requirements. See also Matthews v. Hadley, 361 U. S. 127 (1959), where this Court affirmed without opinion the trial court's refusal to strike down Indiana's gross income tax on the ground that the legislature was malapportioned.

The petitioners place some reliance on Cipriano v. City of Houma, 395 U.S. 701 (1969), and Phoenix v. Kolodziejski, 399 U. S. 204 (1970). In both of these cases, the plaintiffs sued to enjoin the issuance of municipal bonds which had been authorized at an election in which the plaintiffs had not been allowed to vote. In both cases, the plaintiffs sought to prevent the direct consequence of the

tainted election, the issuance of bonds. These cases offer no support for the proposition that acts done pursuant to the enactments of a de facto legislative body are invalid.

The petitioners were not allowed to vote for the Board of Aldermen that enacted the original zoning classification, R-5 and R-6. If the ordinance rezoning the property to classification I-3 is invalid, then so must have been the original zoning enactment. It is clear that the petitioners have no standing as voters to attack either enactment, but if they attack one, the other must necessarily fall. Any other conclusion is absurd. Whether the petitioners' defect is stated in terms of a lack of standing to sue because there is no nexus between the status asserted by the litigant and the claim he presents (Flast v. Cohen, 392 U. S. 83, 102 [1968]) or whether it is stated in jurisdictional terms as a failure to assert a claim that arises under the Constitution or laws of the United States, the effect is the same.

42 U.S.C. § 1983 obviously contemplates that the action brought pursuant to it be designed to redress the deprivation of rights and not for some other

purpose, wholly unrelated to the deprivation. In Pierre v. Jordan, 333 F. 2d 951 (9th Cir. 1964) the plaintiff brought an action based in part upon 42 U.S.C. § 1983 to prevent the formation and financing of a waterworks district. She brought the action on behalf of herself and other property owners in the affected area. The Court held that the District Court did not have jurisdiction under § 1983 and 28 U.S.C. § 1343 because

> ". . . .[T]he prime purpose of the suit is not to redress those asserted constitutional deprivations per se but, on these and other grounds, to put the waterworks district out of business.
>
> * * * *
>
> "Where there is some other principal objective of the litigation, and the deprivation of constitutional rights is asserted only as a means of achieving that objective, the subject matter is not cognizable under the Civil Rights Act, and the district court jurisdiction thereunder is lacking."

333 F. 2d at 957, 958.

III.

THERE WERE ADEQUATE NON-FEDERAL GROUNDS FOR THE DECISIONS OF THE LOWER COURTS-- A MUNICIPALITY IS NOT SUBJECT TO ZONING REGULATIONS.

For the petitioners to be entitled to the relief they seek, it would be necessary for a court to find (1) that the local public acts (Session Laws 1947, Ch. 677, Section 23, et seq., as amended Session Laws 1953, Ch. 777, Section 1) and by implication G. S. § 160-181.2 are unconstitutional in allowing a municipality to exercise extraterritorial zoning powers without giving the franchise to those living in the areas over which the powers are exercised; (2) that because the statute is unconstitutional, the zoning regulation attacked here, and no other, is void and should be struck down, and (3) because the zoning regulation is void, uses to which the property has been put that would violate the prior zoning ordinance may be enjoined by a Federal Court. It is the third proposition to which this section of the brief is addressed.

At the outset, it should be noted that the petitioners have indicated no reason why they would be entitled to enjoin the proposed use upon establishing

the invalidity of the rezoning ordinance. Assuming the rezoning ordinance and no other enactment of the allegedly malapportioned board is invalid, there is still no basis for enjoining the proposed use. The cases are clear in North Carolina and elsewhere that a municipality may ignore its own zoning enactment or that of another governmental body in performing a governmental function. Thus, the Board of Aldermen did not need to rezone the property in the first place in order to construct the landfill. Under State law, the landfill could have been built regardless of how the property was zoned and the constitutionality of the zoning ordinance need not have been decided.

It is clear under North Carolina law that in constructing a sanitary landfill, a municipality is performing a governmental function. In Scales v. City of Winston-Salem, 189 N.C. 469, 127 S.E. 543 (1925), the plaintiffs sought to recover damages for personal injuries allegedly suffered from the City's operation of an incinerator for the burning of garbage. In holding that the plaintiff could not recover, the Supreme Court of North Carolina stated:

> "In applying these principles, we must hold that the incinerator was built in the discharge of a governmental function. The power to maintain public works, buildings and improvements; to remove garbage, and to provide for the health, comfort and welfare of the people is conferred by statutes on the cities and towns of the State . . . It was in pursuance of this legislation that the furnace was constructed; and . . . the acts complained of were in the performance of duties authorized by laws solely for the public benefit, governmental in character and not merely private and corporate."

Id. at 471, 127 S.E. at 545. See also James v. City of Charlotte, 183 N.C. 630, 112 S.E. 15 (1915).

It is equally clear in North Carolina that a municipality is not bound by its own zoning enactments. In McKinney v. City of High Point, 237 N.C. 66, 74 S.E. 2d 440 (1952), the plaintiffs complained that the erection by a municipality of a water storage tank in connection with its waterworks system was in violation of the zoning ordinances

of the City of High Point. After first finding that the construction of a water tank was the performance of the governmental function, the Court examined the cases in other jurisdictions on the point of whether or not a municipality is bound in the performance of a governmental function by zoning regulations and concluded as follows:

> "The Complaint does not state the purpose for which the defendant purchased land, and erected the water tank. It is a fair inference that it was erected for the purposes of public health, sanitation, fire protection and selling water for gain to the inhabitants and businesses within the City. Under our former decisions, we conclude, and so hold, that the erection of this water tank was done by the defendant in its governmental capacity and that its zoning ordinances did not apply."

Id. 75, 74 S.E. 2d at 446.

It was evident that the General Assembly of North Carolina intended that municipalities not be bound by zoning ordinances in the performance of governmental functions which do not involve

the construction or erection of buildings when it enacted N. C. General Statutes § 160-181.1 which makes zoning regulations applicable to the erection and construction of buildings by the State and its political subdivisions. The statute could have been made applicable to all governmental functions, rather than just the construction or erection of buildings; it was not.

The petitioners in the lower courts have advanced the theory that if the zoning regulation in question were struck down, the county could step in and enact zoning regulations that presumably would bind the City of Winston-Salem. The cases hold, however, that a municiplaity is no more bound by a zoning regulation of another governmental entity than it is by its own. City of Scottsdale v. Municipal Court of the City of Tempe, 368 P. 2d 637 (Ariz. 1962); State ex rel Askew v. Kopp, 330 S.W. 2d 882 (Mo. 1960).

Since under State law, the respondent could have ignored its own zoning ordinances and was not subject to the zoning jurisdiction of the county of Forsyth, an adjudication of the unconstitutionality of the legislation enabling the City to exercise extraterritorial zoning authority would not give

the petitioners the relief they seek.

Even more important, the petitioners have no standing under State law to enjoin the proposed use of the property on the grounds that the zoning ordinance is invalid. This is not only a collateral attack upon the ordinance itself, but the petitioners have not shown the requisite interest in the controversy to give them standing. Obviously, they have no standing as voters to prevent the construction of landfills. By the same token, under State law, they have no standing as "neighboring property owners" to enjoin the use to which the property is being put. Their only basis for standing is that they do not like having the landfill near them. This is insufficient. Ratner v. City of Richmond, 201 N.E. 2d 49 (Ind. 1964). The petitioners cite two North Carolina cases, Schloss v. Jamison, 258 N.C. 271, 128 S. E. 2d 590 (1962) and Clinard v. City of Winston-Salem, 217 N.C. 119, 6 S.E. 2d 867 (1940) for the proposition that the constitutionality of a zoning enactment may be tested by an action for an injunction. It need hardly be said that these cases involve actions to enjoin the enforcement of the ordinance insofar as it inhibited the use of the plaintiffs' own property. Obviously, these

cases have no bearing on the facts at hand.

IV.

CONCLUSION

The gist of the petitioners' claim is that they do not like having a sanitary landfill near their homes and that they would like to prevent the use of the respondent's property for that purpose. It is submitted that they cannot frame this claim in terms of the jurisdiction of the Federal Courts and that the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted this 20th day of October, 1972.

W. F. Womble

John L. W. Garrou

Post Office Drawer 84
Winston-Salem, N. C. 27102
Attorneys for Respondent

Of Counsel:

Womble, Carlyle, Sandridge & Rice
2400 Wachovia Building
Winston-Salem, N. C. 27102
Telephone: (919) 725-1311